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Attitudes About Attitudes

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THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED. By *Jeffrey A. Segal* and *Harold J. Spaeth*. Cambridge: Cambridge University Press. 2002. Pp. xix, 459. Paper, $25.

INTRODUCTION

Attitudes about the Supreme Court differ sharply, particularly among academics. Law professors believe the Constitution and other laws constrain the Court, while most political scientists do not. These different perspectives on justices' fidelity to the law[1] ensure that legal scholars and political scientists have little to say about the Court that is of interest to each other.

As a result, it should not be surprising that most legal scholars are unfamiliar with Harold Spaeth[2] and Jeffrey Segal,[3] the two political scientists most closely associated with the view that the law does not constrain the justices from voting their policy preferences. Building on social psychology research and theory, Spaeth initially constructed and Segal later joined in refining the so-called attitudinal model. In several publications including a classic book published in 1993,[4] Spaeth and Segal ("the authors") explain and demonstrate the empirical support for their model as holding that justices decide cases on the basis of their personal attitudes about social policy and not on the basis of any genuine fidelity to law. In 1999, the authors empirically demonstrated that precedent did not constrain the justices from voting their policy

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1. *See generally* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 280-84 (1997) (contrasting the "internal" and "external" perspectives on the law).

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3. Professor of Political Science, State University of New York at Stony Brook.

4. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

preferences.[5] This and other research have made the authors lightening rods among political scientists who study the Court.

Spurred by their zealous commitment to the attitudinal model and their notoriety among political scientists, the authors revised their classic work to update its empirical foundation and to respond to their critics. The revised work constitutes their most extensive challenge yet to skeptics of the attitudinal model.

In this Review, I assess the renewed claim about the attitudinal model's superiority in explaining and predicting the Court's decisions. After reviewing the book's basic arguments in Part I, I examine in Part II the critique of competing models. The major problem with this critique is its failure to appraise other models in their strongest forms. The authors insist other models satisfy the rigid criteria for scientific inquiry — i.e., they should posit falsifiable propositions — even though each is supported by other, common social-science research strategies.

Part III examines the attitudinal model's major limitations. First, it vainly seeks to objectify and quantify inherently subjective data. Second, it cannot explain short- or long-term change in constitutional law. It assumes mistakenly that all justices have fixed preferences when first appointed and that the categories for demarcating ideologies are constant.

Part IV suggests future research to perfect the attitudinal model. These suggestions include tracking extensively the connection between justices' backgrounds and decisions; assessing the implications of the Court's judgments configured as standards or rules, which help to explain their unpredictability; and tracing the patterns of decisions and precedent's functions in constitutional adjudication. Researching these questions is likely to support greater coordination of competing models of the Court. A synthetic model conceivably holds the greatest promise of comprehensively explaining the Court's decisions.

I. REVISITING THE ATTITUDINAL MODEL

The authors' new book significantly revises and updates two themes explored in their earlier research. The first theme is the failure of non-attitudinal models to explain and predict the Supreme Court's decisions. In earlier works, the authors posited a simplistic version of the legal model as mechanically controlling legal interpretation and permitting no indeterminacy.[6] In their revised book, they analyze the legal model as "the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light

5. *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999).

6. *See, e.g.*, *id.* at 8-9.

of the plain meaning of statutes and the Constitution, the intent of the framers, and/or precedent" (p. 48; citation omitted). Their analysis includes critiquing Ronald Dworkin's view that "stare decisis plays a vital role in judicial decision-making."[7] Dworkin argues the quest to find a fit between past cases and a "hard" one in which no preexisting rule of law exists leads judges to "eliminate interpretations that some judges would otherwise prefer, so that the brute facts of legal history will in this way limit the role any judge's personal concoctions can play in his decisions."[8] The authors suggest, however, that Dworkin's (and others') conception of the law fails to meet the exacting standards of scientific research, because it is not "falsifiable. . . . [T]he model must be able to state a priori the potential conditions that, if observed, would refute the model" (p. 46). Because the legal model posits no such conditions, it is irrefutable.

Drawing on prior research, the authors consider:

> [T]he best evidence for the influence of precedent must come from [justices who dissented] from the majority opinion . . . under question, for we *know* that these justices disagree with the precedent. If the precedent established in the case influences them, that influence should be felt in that case's progeny, through their votes and opinion writing. Thus, determining the influence of precedent requires examining the extent to which justices who disagree with a precedent move toward that position in subsequent cases. (p. 292)

The authors searched 2418 votes and cases for evidence of the "gravitational force" of precedent that they believe is claimed by Dworkin,[9] the " 'respect for precedent' " Ronald Kahn claims justices exhibit,[10] or the validity of Herman Pritchett's "statement that " '[j]udges make choices, but they are not the 'free' choices of congressmen.' "[11] In categorizing attitudes towards precedent, the authors treated justices who supported challenged precedents as "precedentialists" (ranging from strong to weak) and justices who did not as "preferentialists" (ranging from strong to weak) (p. 296). They further broke down cases into "ordinary" and "landmark" cases as rated by Congressional Quarterly's Guide to the U.S. Supreme Court (p. 295). Their data showed that "[t]he justices are rarely influenced by stare decisis" (p.

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7. P. 50 (discussing RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]).

8. DWORKIN, LAW'S EMPIRE, *supra* note 7, at 255.

9. *Id.* at 401.

10. P. 288 (quoting Ronald Kahn, *Interpretive Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 175 (Cornell W. Clayton & Howard Gillman eds., 1999)).

11. P. 298 (quoting C. Herman Pritchett, *The Development of Judicial Research*, *in* FRONTIERS OF JUDICIAL RESEARCH 42 (Grossman & Tanenhaus eds., 1969) (alteration in original)).

298). It demonstrated "beyond doubt . . . that the modern Supreme Courts, heavily criticized for their activism, did not invent or even perfect preferential behavior; it has been with us since Washington packed the Court with Federalists" (p. 300). The few precedentialist acts are irrelevant because they are

> more likely to be found in cases of the lowest salience: ordinary cases compared with landmark cases and, among ordinary cases, statutory cases over constitutional cases and modern economic cases over modern civil liberties cases. The influence of precedent appears to be quite minor, but it does not appear to be completely idiosyncratic. (p. 306)

Indeed, "not one justice of the Rehnquist Court exercised deference to precedent by voting to uphold both conservative and liberal precedents" (p. 310).

A second model derives from rational-choice theory, which the authors did not address in their earlier book. They identify "two camps" of rational-choice theorists who study the Court (p. 100). The first is "an internal camp that focuses on the interactions among the justices" to facilitate or achieve the maximization of their collective satisfaction (p. 100).

> Equilibria . . . are crucial to most rational choice theorists. They represent "a prediction, for a prespecified circumstance, about the choices of people and the corresponding outcomes. This prediction generally takes the form of 'if the institutional context of a choice is . . . and if people's preferences are . . . then the only choices and outcomes that can endure are. . . .' " (pp. 99-100; citation omitted, ellipsis in original)

Thus, equilibrium theory "provid[es] necessary and sufficient conditions for choices to occur" (p. 100). The authors acknowledge other theorists — principally Lee Epstein and Jack Knight — who "dispute the centrality of equilibrium analysis for rational-choice models, labeling the positions taken by each side of the debate a play 'to its competitive advantage' " (p. 100; internal citation omitted). Nevertheless, the authors consider equilibrium theory as the "most powerful tool and is clearly *the* comparative advantage that rational-choice theory has over other theories" (p. 100) because it provides the means by which to construct falsifiable models of strategic behavior by "demonstrat[ing] that interactions among the justices constitute a best response to a best response, or alternative equilibrium solutions" (p. 102). Rational-choice theorists mistakenly infer strategies from the outcomes achieved in particular cases, even though this is circular; and they "allow [justices to pursue] any goals whatsoever," making every objective achieved rational (p. 111).

The second camp of rational-choice theorists focuses on constraints imposed on the Court by political actors. These theorists favor separation-of-powers models, which "examine the degree to which the courts must defer to legislative majorities in order to prevent overrides that result in policy worse than what the court might have achieved

through more sophisticated behavior" (p. 103). In the authors' judgment, the best of these works is Brian Marks's study of a statutory case in which "the justices simply voted their ideal points."[12] Other separation-of-powers models are undermined by flawed assumptions, including "that the Court will construe legislation as close to its ideal point as possible without getting overturned by Congress" (p. 105); "the justices have perfect and complete information about the preferences of Congress" (p. 106); disallowing "the Court from bundling issues" (p. 107); treating legislation overturning decisions "as costless" (p. 107); and "always giv[ing] Congress the final move" (p. 108). The most serious problem with these models is their uniform treatment of "judicial preferences as if they were exogenously determined" (p. 109).

The final model rejected by the authors is postpositivism, sometimes called the new institutionalism. This model

> make claims, not about the predictable behavior of judges, but about their state of mind — whether they are basing their decisions on honest judgments about the meaning of law. What is post-positivist about this version is the assumption that a legal state of mind does not necessarily mean obedience to conspicuous rules; instead, it means a sense of obligation to make the best decision possible in light of one's general training and sense of professional obligation. On this view, decisions are considered legally motivated if they represent a judge's sincere belief that their decision represents their best understanding of what the law requires . . . . "[J]udging in good faith" is all we can expect of judges.[13]

Postpositivists reject the need to construct a falsifiable model based on their belief "that doing [empirical] tests has the effect of changing the concept of 'legal influence' so that it no longer represents what they believe"[14] are significant errors. Nevertheless, "virtually any decision *can be* consistent with the legal model. And any decision *is* consistent with the model as long as the judge has sincerely convinced him- or herself that the decision is legally appropriate" (pp. 432-33). The postpositivist model also "fails to appreciate the fundamental influence of motivated reasoning in human decision making" (p. 433), i.e., it fails to recognize people invariably convince themselves of the rationality of what they are doing.

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12. P. 104 (quoting BRIAN A. MARKS, A MODEL OF JUDICIAL INFLUENCE ON CONGRESSIONAL POLICYMAKING: *GROVE CITY COLLEGE V. BELL* 88-7 (Hoover Institution, Stanford University, Working Papers in Political Science No. P-88-7, 1981)).

13. P. 432 (quoting Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 486 (2001) (internal citations omitted)); *see also* p. 48 n.12 ("To post-positive legalists, the only required influence of law is a subjective influence that resides within the justice's own mind.").

14. P. 433 n.8 (quoting Gillman, *supra* note 13, at 485).

The second theme of the book is the claim that the attitudinal model best explains and predicts Supreme Court decisions. The authors describe the "the ideological considerations that have motivated the thrust of the Court's decisions since its inception" (p. xvi). They also proclaim *Bush v. Gore*[15] as proof for their model, for "one may accurately say that never in its history has a majority of the Court behaved in such a blatantly *politically* partisan fashion" (p. 171). The decision stands out because the majority upheld for the first time an equal protection claim without any "showing [of] purposeful intent to discriminate" (p. 172). The majority "produc[ed] an arrogantly anti-states' rights decision" in spite of its frequently professed concerns for state sovereignty (p. 174). Its transparency is further evident in eight cases over a four-and-a-half-year period in which a bare majority of the Rehnquist Court struck down federal laws for violating state sovereignty in spite of the decisions' complete detachment from constitutional text, history, and precedent.[16] The authors believe the only explanation for these decisions is the majority's preferences to "formalistically redefin[e] federal-state relationships" in order to curtail congressional efforts to implement social policies with which the justices disagree and to preserve certain power relationships within the states (p. 174).

The authors further claim that "[o]nly the attitudinal model's explanation [of Court decisions] is well supported by systematic empirical evidence" (p. 351). Throughout the book, they draw on the extraordinary database that they have assembled on the justices' backgrounds, nominating presidents, supporting and opposing senators, and the procedural histories and outcomes of the Court's decisions. Thus, their aggregate analysis of data on Supreme Court nominations and confirmations leads to their finding that:

> [A] nominee's reception [in the Senate] hinges on the characteristics of the nominee and the composition of the Senate. So, too, the context of a nomination strongly influences the outcome. The strength and popularity of the President emerge as important determinants of individual votes. In addition, the relative mobilization of interest groups around a nominee also has pronounced effects. (p. 222)

Based on reversal and prediction strategies of the justices' voting on certiorari petitions, the authors found that:

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15. 531 U.S. 98 (2000).

16. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Printz v. United States, 521 U.S. 898 (1997); Idaho v. Coeur d'Arlene Tribe, 521 U.S. 261 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995).

> The link that connects the various factors that determine who gets into the Supreme Court are the individual justices' personal policy goals. Given the freedom to select for review such cases as they wish, the factors that govern selection and the strategies that the various justices employ in voting to review a case are matters of individual determination. (p. 276)

Based on their careful coding and tracking of the justices' votes in landmark and ordinary cases, they found " 'crisis' stare decisis" in which "the decision to overturn precedent is conditioned on the ideological direction of the precedent being overturned" (p. 311). Based on bivariant and multivariant analyses of coalition formation and opinion assignments, they determined "justices are capable of engaging in sophisticated behavior in arenas [such as voting on certiorari] where sophisticated voting clearly makes sense" (p. 350).

> Unlike the decision on the merits, coalition formation takes place in an inherently interactive environment, as both attitudinal and rational choice based works have demonstrated. Nevertheless, the sincere preferences of the justices go a long way toward explaining their decisions [to write separately or join others' opinions], while interactive factors such as influence do not. (p. 404; footnotes omitted)

Indeed, "influence," or the ability of other justices to persuade others to join their opinions, "seems to be a function of like-mindedness" (p. 404). Nor did the authors find any evidence indicating that public opinion influences decisions. Moreover, the aggregated votes of individual justices on the Rehnquist Court indicate that, "[o]utside of support for the Solicitor General (including agency cases), [concerns about judicial restraint] are either imperceptible or explained by the justices substantive policy preferences" (p. 428).

Near the end of their book, the authors propose future research on the Court, including determining whether the "sequential process of certiorari voting lead[s] to a signaling game," the extent of the opinion-writer's influence in shaping outcomes, the extent to which lower courts "tailor[] [their] preferences to the Court median" in spite of an arguably controlling Supreme Court precedent written "off the median," the extent of median justices' influence in shaping the reasoning or outcomes of Court decisions, and whether "the structural features of the American political system [can] lead to a compelling formal model of rationally sincere behavior on the merits for the justices, even in statutory cases" (pp. 434-35).

II. THE LIMITS OF THE ATTITUDINAL CRITIQUE

This Part assesses the authors' critique of other models of the Supreme Court. If the critique fails, the attitudinal model can no longer claim exclusive capacity to explain and predict judicial decisions.

A. *The Legal Model*

The major problem with the critique of the legal model is no such legal model exists. The authors' description of the legal model does not correspond to legal scholars' conception of law. They have never purported to construct a formal model of legal reasoning, much less a scientific one. The authors concede as much when they chastise legal scholars for refusing to construct a model akin to that which scientists employ.

This refusal is common among social scientists. In fact,

> legal scholarship frequently pursues doctrinal, interpretive, and normative purposes rather than empirical ones. Legal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists' rules can indict legal scholarship — any more than strict adherence to the rules of baseball supports an indictment of cricket.[17]

Other fields, such as presidential studies, employ similar methods.[18] Moreover, the authors' "empirical methodology blinds them to legal scholarship's internal perspective" or legal scholars' efforts to explain the process by which judges and justices "interpret" the law.[19] The internal perspective includes methods for criticizing the coherence of different interpretative methodologies. The authors ignore, however, arguments over methodology. They fail to appreciate how legal scholars and judges critique alternative interpretive approaches based on their internal coherence *and* achievement of their stated objectives. Thus, Dworkin's account of legal reasoning is evaluated on how it makes sense of data on judging and compares with alternative explanations.[20]

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17. Jack Goldsmith & Adrien Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153-54 (2002).

18. For a sampling of works in presidential studies relying on doctrinal, interpretive, and normative analyses rather than empirical analysis, see FRED I. GREENSTEIN, THE PRESIDENTIAL DIFFERENCE: LEADERSHIP STYLE FROM FDR TO CLINTON 5 (2000) (focusing on "the leadership qualities of each of the presidents from FDR to Bill Clinton and their significance for the public and the political community"); SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT 1776-1998 (3d ed. 1999) (offering interpretive political history of the presidency); and STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH (1993) (assessing presidents as agents of political change by tracing the "intercurrence of the basic types of political leadership with expansion and diversification of the institutional universe of presidential action"). *See also* PRESIDENTIAL POWER: FORGING THE PRESIDENCY FOR THE TWENTY-FIRST CENTURY (Robert Y. Shapiro et al. eds., 2000) (commentaries on the methodologies employed in studying the presidency from Richard Neustadt's classic work in the field to recent scholarship).

19. Goldsmith & Vermeule, *supra* note 17, at 154.

20. *See, e.g.*, p. 298 (suggesting that "[t]he levels of precedential behavior that we find in the U.S. Supreme Court are simply not consistent with the sort of arguments we find, for example, in Dworkin, Kahn, or any of the other legalists that we have discussed"). For a

The authors' external perspective leads them to distort the law repeatedly. For instance, variations in judicial votes might not be evidence of hypocrisy but rather demonstrate that "what they call 'subjective preferences' may be nothing more than honest attempts to apply consistent interpretive philosophy to the facts."[21] They also discount the fact that the Court decides hard cases. "Virtually none of the disputes that reach the Court are easy cases. Most of them concern issues for which sources of legal authority — constitutional text, original understanding, evolving tradition, precedent — do not yield determinate answers."[22] The Court's docket consists of cases in which no source points to a simple or obvious answer. In the close cases that get to the Court, ideology arguably plays a significant role in shaping the justices' attitudes towards, or manipulation of, legal materials. Yet, the pertinent ideology is not the same as partisan attitudes. It is *judicial* ideology, which entails a perspective on federal judges' role in the constitutional order.[23] The authors never systematically track or examine the significance of such ideology.

Four other examples further illustrate the authors' distortions. The first is their insistence that *Bush v. Gore* constitutes "the most egregious example of judicial policy making" ever (p. 2). Curiously, they fail to acknowledge that many legal scholars would agree. Even so, the claim is dubious, because seven justices — including Clinton appointee Stephen Breyer — upheld Bush's equal protection claim and consequently agreed to reverse the Florida Supreme Court's ruling that preserved Vice-President Gore's challenge to Florida Secretary of State Kathleen Harris's certification of the Florida election in Bush's favor. This was a bipartisan coalition of justices who supported Bush's claim. Nor do the authors acknowledge the implications of the Florida Supreme Court's failure to take advantage of an available basis in the law upon which to insulate its judgment from Supreme Court review, a failure that prompted a unanimous decision by the Court[24] that provided the state supreme court with the chance to clarify an "independ-

commentary on how best to evaluate Dworkin's scholarship, see Edward J. McCaffery, *Ronald Dworkin, Inside-Out*, 85 CAL. L. REV. 1043 (1997).

21. Gerald N. Rosenberg, *The Supreme Court and the Attitudinal Model*, 4 LAW & CTS. 6, 7 (1994).

22. Vincent Blasi, *Praise for the Court's Unpredictability*, N.Y. TIMES, July 16, 1986, at A23.

23. *See generally Should Ideology Matter?: Judicial Nominations 2001: Hearing Before the Senate Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. App. (2001) (special hearing explaining the relevance of ideology to judicial selection).

24. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

ent and adequate" basis for its initial judgment in Florida election law.[25]

Moreover, the authors' claim that the majority's ruling contradicted their usual preference to rule in favor of state sovereignty demonstrates a lack of understanding of the implications of the Court's ruling. The seven-member majority voted to leave the final word on the outcome of the Florida election not to federal judges but rather to the state's political authorities. The ultimate winners in the case were not the justices (in fortifying the scope of federal judicial review over state-court judgments) but rather the state political authorities in managing Gore's challenge.[26]

Second, the authors distort the Court's decision striking down the Line Item Veto Act.[27] They suggest that the argument that the Constitution does not define "bill" and otherwise says nothing about what the President may veto should have controlled the case. The strongest argument for supporting the act, however, was that it satisfied the nondelegation doctrine,[28] i.e., Congress furnished "intelligible principles" that the President was bound to follow. The question in the case was whether Congress could delegate to the President limited authority to cancel specific appropriations measures, not whether he had inherent authority to do so.

The authors also fail to acknowledge the significance of the dissent. They mention the vote was six to three, but they neglect to mention that Justices Sandra Day O'Connor, Antonin Scalia, and Stephen Breyer were the dissenters.[29] There is no obvious ideological common ground among these justices. They dissented, not because of constitutional silence or failure to define "bill," but rather because of their agreement that the statute satisfied the Constitution's nondelegation doctrine.

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25. For example, in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Court explained that "when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

26. The authors refer mistakenly to three justices "overrul[ing]" the Florida Supreme Court. P. 1. They are referring to the Chief Justice's separate concurrence, joined by two other justices. Six justices refused to join this concurrence and thus endorse its peculiar construction of Article II as vesting state legislatures with exclusive authority to determine the procedures for presidential elections.

27. Clinton v. City of New York, 524 U.S. 417 (1998).

28. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

29. *See* p. 170; *Clinton*, 524 U.S. at 484-90 (Breyer, J., dissenting, joined by O'Connor, J., and Scalia, J.) (arguing that the act satisfied the nondelegation doctrine).

Third, the authors ignore legal justifications for many other cases.[30] The authors exclude unanimous opinions from their data set on the justices' fidelity to precedent because these opinions lack the friction that presumably provides the impetus for justices to express their respective policy preferences.[31] Unanimity is hard, however, to square with a critique of the legal model that suggests the justices never, or almost never, make decisions based on legal variables. Even worse for the critique of the legal model is that many unanimous and nearly unanimous opinions involve salient issues on which the justices transcend their ideological differences to reach agreement about the law.[32]

Fourth, there are problems with the authors' claim that there is no "better example of judicial doublespeak" (p. 11) than *Printz v. United States*[33] in which the Court struck down the Brady Handgun Prevention Act's requirement that local authorities conduct background checks on prospective handgun purchasers. The authors mistakenly assert the Court struck down the entire act; it did not. It specifically overruled the provision mandating local officials to implement federal policy. The Court's decision arose from the "structure of the Constitution,"[34] which the authors regard as completely detached from the text, and as mere subterfuge allowing the majority to obfuscate its real intent. The idea that drawing inferences from the structure is "doublespeak" is astounding. Structural design is, as Charles Black suggested, arguably the most significant source of constitutional meaning, and one whose legitimacy has been recognized by every

30. Every case that is explicable on the basis of some legal variable is inconsistent with the attitudinal model. *See, e.g., infra* note 32 and accompanying text.

31. *See* p. 295 ("We exclude . . . unanimously decided cases. Only dissenters can be conflicted between their stated preferences and the precedent the majority established in that case.").

32. *See, e.g.*, Eldred v. Aschroft, 123 S. Ct. 769 (2003) (upholding, seven to two, Congress's repeated extensions of the rights of copyright ownership in spite of constitutional language allowing Congress to do so for "limited terms"); Reno v. Condon, 528 U.S. 141 (2000) (unanimously upholding Congress's power to bar states from disclosing or selling personal information required for drivers' licenses); Saenz v. Roe, 526 U.S. 489 (1999) (reinvigorating, seven to two, the Privileges or Immunities clause); Clinton v. Jones, 520 U.S. 681 (1997) (unanimously holding that sitting presidents are not entitled to any immunity from civil lawsuits based on their unofficial misconduct); United States v. Virginia, 518 U.S. 515 (1996) (ruling seven to one Virginia Military Academy's policy of excluding women as students violated equal protection); Nixon v. United States, 506 U.S. 224 (1993) (unanimously agreeing that the Court lacked the power to review the constitutionality of the procedures employed by the Senate in judicial impeachment trials); Morrison v. Olson, 487 U.S. 654 (1988) (upholding the constitutionality of the Independent Counsel Act eight to one); United States v. Nixon, 418 U.S. 683 (1974) (unanimously holding presidents not entitled to an absolute executive privilege that would have allowed them unilateral discretion over whether to comply with otherwise lawful subpoenas).

33. 521 U.S. 898 (1997).

34. *Printz*, 521 U.S. at 918-25.

justice, regardless of ideological preference.[35] Indeed, the concept of separation of powers to which the authors frequently refer is an inference from it.[36] There is nothing principled about a critique that rejects an inference as a contrivance but then employs it when it suits the critics' purposes.[37]

The authors' dismissal of the "structure of the Constitution" as socialized contrivance is unfair. They presume that socialization has blinded the justices to accept clearly correct answers to constitutional questions, though they never stitch a coherent methodology together. The authors' claim also lacks any empirical support — it violates the rules of inference, which, as the next Section shows, some scholars insist is indispensable for empirical research in social science.

B. *The Rational-Choice Model*

There are many problems with the authors' critique of rational-choice models. First, their critique is not directed at arguably the most significant work done on the Court by rational choice theorists. The authors suggest that "the most prominent of the recent rational choice works on the Supreme Court" are problematic because they do not attempt, or fail when they do attempt, to measure equilibrium predictions (p. 102). Yet, they also mention that Lee Epstein and Jack Knight dispute "the centrality of equilibrium analysis for rational choice models" (p. 100). The authors never explain why they "agree with Epstein and Knight that equilibrium analysis is not the only way to 'do' rational choice theory" (p. 100). The sparse discussion of Epstein and Knight is likely to leave readers with the false impression that Epstein and Knight's work is insignificant. Yet, Epstein's scholarship on her own, with Knight, and with others, are probably the best known among rational-choice models of the Court. Her major thesis is that the justices are not completely free to vote their policy preferences but rather operate within a specific institutional environment that sometimes constrains the justices to take various factors into con-

35. *See* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

36. *See, e.g.*, pp. 18-20, 22, 43, 231.

37. The authors further condemn the majority opinion for rejecting practices

> dating back to the first Congress. . . . As *Federalist* 27 argues, "The legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its law." While *The Federalist* is not fundamental law, we are aware of no Supreme Court decision that more directly contradicts an explicit statement from the Papers.

P. 174; internal citation omitted.

The authors do not acknowledge that the majority cited the passage but did not find it determinative because it failed to address the question before the Court — whether the handgun law exceeded Congress's "constitutional authority."

sideration, such as the norm of stare decisis, when formulating strategies to implement their objectives.[38]

The clash between the attitudinal model and Epstein and Knight's work is most apparent in the authors' discussion of the extent to which precedent genuinely constrains the justices from voting their policy preferences. In an earlier article, Epstein and Knight argued that "precedent can serve as a constraint on justices acting on their personal policy preferences."[39] Although judges and justices might prefer to ignore precedent in favor of their preferred policies, they are constrained by the utility of precedent in fostering social stability and judicial legitimacy. Others might react negatively if the Court violated precedent. In support of the significance of precedent in judicial decisionmaking, Epstein and Knight pointed to the ubiquity of citations to precedent in published judicial opinions as well as in the arguments of litigants and the private discussions of the justices themselves. The authors responded that ubiquity was not influence. Moreover, they claimed the evidence, on which Epstein and Knight relied, actually demonstrated that the justices felt little social pressure to adhere to precedents.[40] The authors' quarrel is less with Epstein and Knight's empirical methods than with the implications of their data. Moreover, they cite, but do not discuss, other work consistent with Epstein's approach, demonstrating, for example, that standing doctrine is the culmination of the justices' strategic decision making to create some barriers on the abilities of ideological plaintiffs to manipulate the Court's docket.[41]

Moreover, a crucial dimension of Epstein's and others' rational-choice models is their agreement with Ferejohn and Weingast's insight that "there is no 'last word' in politics."[42] This dynamic ensures there is no point of equilibrium attainable in the political process. At best, the justices never cease to try to gain some competitive advantage over the other branches until the wheel turns and the power relationship among them alters.

The second, related difficulty is that Epstein has been as critical as the authors with respect to legal scholars' methodological laxity. For

38. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICE JUSTICES MAKE (1998). For some perspective, see FOREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000), which examines the ways in which intracourt bargaining affects the opinion-writing process.

39. Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021 (1996).

40. Jeffrey A. Segal & Harold J. Spaeth, *Norms, Dragons, and Stare Decisis: A Response*, 40 AM. J. POL. SCI. 1064-82 (1996).

41. P. 435 (citing MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000)).

42. P. 108 (quoting John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 263 (1992)).

instance, she and Gary King argued that legal scholars generally fail to follow the rules used in natural and social science for drawing inferences from empirical research.[43] They insisted, inter alia, that legal scholars need to draw and define data properly and provide guidance for drawing conclusions from the data and hypotheses tested. Epstein and King cautioned against drawing broad inferences from limited data. They objected that legal research often contains "stridently stated, but overly confident, conclusions"[44] that go well beyond what the research will support. They cautioned legal scholars further not to be "definitive,"[45] but "rather to *estimate the degree of uncertainty* inherent in each conclusion and to report this estimate along with every conclusion" to be the degree of uncertainty inherent in their conclusions.[46]

Epstein and King's critique of legal scholars' empirical ignorance can, however, be turned against the attitudinal model.[47] The authors suggest the Court's activism in striking down a historic number of federal laws within the past five years shows the justices' willingness to substitute their judgment for that of Congress, but the authors draw the wrong inference. None of these cases, with the possible exception of *United States v. Morrison*,[48] involved salient issues likely to provoke congressional retaliation. In these cases, the Court only struck down specific provisions within the laws they reviewed that extended their reach to the states. Congress was rarely faced with having to reenact these statutes in full. The application of these laws to the states is not a salient issue for Congress because most Americans do not appear to care about the implications of Congress's inability to subject the states to various regulatory schemes.

Moreover, the authors draw the wrong inferences from their data on legal reasoning. At most, the data show a consistency between outcomes and justices' policy preferences, but the only plausible inference to draw from these data is that it does not rule out the possibility that justices decide some cases consistent with their ideological preferences. The data do not show legal variables are not factors in the justices' decisions.

The third problem is that the authors often agree with rational-choice theory's insights. The agreement is hard to square with their

43. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

44. *Id.* at 7.

45. *Id.* at 52.

46. *Id.* at 50.

47. *See, e.g.*, Frank Cross et al., *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002).

48. 529 U.S. 598 (2000) (overturning the civil remedies provision of the Violence Against Women Act).

repeated dismissal of the utility of rational-choice theory. Yet, they agreed that "justices are capable of engaging in sophisticated behavior in arenas where sophisticated voting clearly makes sense" such as in certiorari voting (p. 350). They further conceded that they do not

> say that the Supreme Court *never* engages in sophisticated behavior on the merits. Rather, given the difficulty of passing legislation in Congress, given the Supreme Court's rather incomplete information about congressional preferences, the salience of Court decisions to members of Congress, and the short-lived duration of whatever Congress the Court is facing, we argue that the Court virtually never defers to presumed congressional preferences in the first instance. Rather, the justices will routinely vote their sincere preferences. If and when Congress ever mounts a clear and imminent threat to the Court's institutional policy-making powers, then and only then will the Court respond and back down. But given the extraordinary difficulty of striking at the Court's powers, such times will be rare, indeed. (p. 350 n.102)

The authors claim the justices will do whatever the system allows them to do, but this claim is consistent with a rational-choice conception of justices as trying to do just that.

Fourth, rational-choice theorists have defined some critically important variables problematically. For instance, Epstein and King have suggested that an appropriate proxy for measuring a judge's ideology is the ideologies of sponsoring senators.[49] As Dean Richard Revesz has shown, this proxy is flawed, because district court appointees have sponsoring senators, while nominees to appellate judgeships tend only occasionally to have sponsors and those appointed in the District of Columbia rarely do.[50] Supreme Court nominees are even less likely than appellate judges to owe their appointments to a single senator.

An even bigger problem with the authors' critique of rational-choice models is its inability to explain data that can be explained on the basis of the postpositivist model of the Court. Thus, a closer look at the authors' critique of this other model is in order.

C. *Postpositivism*

The major problem with the authors' critique of postpositivism is that they do not analyze it in its strongest form. For example, they fail to acknowledge that postpositivists have ample empirical data to support their conception of judges as trying to "make the best decision possible in light of [their] training and sense of professional obliga-

49. Epstein & King, *supra* note 43, at 83-84.

50. Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 180-83 (2002).

tion."[51] The critical assumption of institutionalists like the postpositivists is that understanding the judicial process requires appreciating the implications of the specific institutional context within which justices operate. Fundamental to this project is accepting that this context has substantive effects, while attitudinalists and rational-choice theorists believe it largely — if not wholly — operates as a cipher.

Postpositivists have amassed an impressive amount of empirical support for their claim that structure shapes judicial decisionmaking. Though not strictly falsifiable, the evidence can be assessed on the bases of logic, experience, and history. Howard Gillman amply summarizes it.[52] This research poses a problem for the critique of the postpositivist model because, as Gillman explains, it has "[a]ll [been] written by scholars who were mindful of the debates in the literature about legal versus personal influences on decision making, and all attempted to show how the judges' expressed beliefs *and* patterns of behavior could only be explained with reference to distinctive legal norms."[53] The authors have yet to make a rejoinder to this copious research except to dismiss it as not being falsifiable and as not allowing for the likelihood that justices will simply use whatever reasoning they can muster to support the outcomes they prefer. The rejoinder falls flat because the massive evidence supporting postpositivism flatly contradicts the attitudinal model on perfectly reasonable grounds.[54]

III. THE LIMITS OF THE ATTITUDINAL MODEL

The bulk of the authors' revised treatise sets forth the data supporting the attitudinal model. The data fail, however, to support the attitudinal model nearly as much as the authors think. There are three significant problems with the model's empirical support, each of which I discuss below.

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51. P. 432 (quoting Gillman, *supra* note 13, at 486).

52. Gillman describes research on the Court's due process and commerce clause decisions from the late nineteenth century to the New Deal era, the Warren Court's failure to constitutionalize welfare rights, the developments of modern free speech and death penalty jurisprudence, and the certiorari process. Gillman, *supra* note 13, at 490-91.

53. *Id.* at 491.

54. *See id.* at 492:

> the major difference [between the empirical work of postpositivists and Spaeth and Segal's] seems to be that Spaeth and Segal create what some legalists would consider a fairly artificial standard for what should count as a legal frame of mind (gravitate toward precedents from which you dissented) while these other scholars made it a focused object of their research to understand and reconstruct the actual legal standards under which these judges were operating.

A. *Empirical Dilemmas*

The major problem with the attitudinal model's empirical support is the authors' objectification of subjective preferences and phenomena. While there are clearly some objective facts in constitutional law (for example, the constitutional text, the winners and losers of lawsuits, and the justices' and their nominating presidents' respective parties) many other factors are subjective, including the characterization of a justice's interpretive methodology or ideology. Reducing these to quantifiable terms, much less to the rigors of scientific measurement, is futile. Richard Posner (to whose critique of legal reasoning they defer[55]) has condemned empirical analysis of the sort employed by the authors as "soft" and unlike the methods of a "hard" field such as physics in which theorists reason to "divergent conclusions from shared premises."[56] The authors search in vain for such premises. Ironically, legal scholars' lack of consensus on explanations for the Court's decisions or criteria for evaluating them is more of a problem for the authors than legal scholars.

The quest to objectify subjective preferences stumbles at almost every turn. For instance, one problem with the authors' original work was the circularity of their research — they had determined justices' attitudes by their votes and then explained their votes by their attitudes. To get around this problem, the authors measure judicial attitudes by four major newspapers' editorials at the times of their appointments and through the justices' earlier votes that are validated through the predictions of later votes (p. 321). Instead of relying on the Court's opinions for the facts of a case, they obtain them from lower-court records.

The external sources the authors have found to validate justices' ideologies are themselves problematic. First, it is unclear why newspaper editorials should be taken as neutral on this matter. It is possible (and many people believe) newspapers have ideological agendas, which will influence their analyses of the justices. Second, the authors' objective should not just be to find an external source for defining a justice's ideology but to find an external source on whose authority most experts can agree. If there are no experts or they cannot agree on a source, the futility of the research is all the more apparent. Third, the reliance on the past votes of lower-court judges is problematic because many Supreme Court nominees have never served, or served only briefly, as lower-court judges.[57] The authors offer no substitute

55. *See* pp. 85, 93.

56. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON 240 (1999).

57. *See* p. 182 ("93 of the 147 nominees (63 percent) [to the Court] have occupied judicial positions" prior to their appointments.).

for measuring these justices' ideology. Fourth, the authors do not account for the fact that state and federal judges have had different caseloads and exposures to the questions they are likely to face on the Court. At the very least, the authors need to account for these differences in determining the relevance of past votes to possible future voting on the Court. Moreover, assessing justices' likely behavior based on their votes as lower-court judges is dubious because lower-court judges are obliged to follow Supreme Court precedents justices are free to question.[58] Fifth, it is odd for the authors to rely on lower-court records of the facts of a case because these judges, too, might be driven by their ideological preferences and thus their rendition of the facts might not be neutral.

Beyond these problems, there are other difficulties with the attitudinal model's empirical support. First, the authors have yet to compile empirical support for their claims about the constraining power of sources other than precedent. Without such support, the authors risk appearing hypercritical. The anecdotal evidence that they amass on the indeterminacy of these other sources does not meet their exacting standards.

Even worse for their model, the authors' data show there is virtually no realm in which the justices' votes perfectly track their ideological preferences. Indeed, they repeatedly acknowledge throughout their book that their data on the Court's practices and decisions show that the attitudinal model largely explains outcomes.[59] The concession reflects the authors' laudable preference for candor, but it undercuts their insistence on the superiority of the attitudinal model.

Second, the authors' research on whether justices follow precedents to which they dissented is dubious. There is no basis for believing justices should follow precedents to which they dissented. The same obligation that lower-court judges have to obey Supreme Court precedent does not extend to the Court's dissenters; they are not considered subordinate in any way to their colleagues and thus have no obligation to accept their colleagues' positions. There is, in other words, no norm that obligates justices to defer to precedents to which they dissented. The legal model allows dissent.

Moreover, the label "preferentialist" used to describe the attitudes of the justices who dissented to an original precedent[60] is misleading. The label suggests these justices reject precedents in favor of their personal preferences and not on the basis of legal considerations. Yet,

58. *Cf.* Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817 (1994) (analyzing inter alia, the conventional arguments for lower courts to follow Supreme Court precedents).

59. *See, e.g.*, pp. 76, 114, 176, 177, 290, 301-02, 311, 319, 350, 367, 378, 399, 404.

60. *See* pp. 296-97.

there is no proof to support this supposition. In fact, the most common explanation for the justices' failures to follow precedents to which they dissented is their preference to follow other precedents.

Third, the authors insist implausibly that the Court is the most important policymaker in our constitutional system.[61] The Court upholds rather than overturns policies in most cases. In these cases, the policies that get implemented reflect the preferences of national political leaders rather than those of the justices. If one were to compile a list of the most significant statutes enacted by the Congress over the past fifty years,[62] it would not reflect any matter over which the Court has exercised any meaningful influence.

Fourth, the authors set up an impossible standard to meet. The authors admittedly predict only 77% of the Court's decisions (p. 319). This is not a bad rate; it leaves, however, a substantial minority of cases that the model promises to, but does not, explain.

Fifth, the authors assume the only preference justices are interested in maximizing is influence over policymaking. Justices, however, have many interests they wish to maximize. Unfortunately, the authors reject every one other than influencing policy because the others cannot be objectively verified. A conventional assumption of economics that individuals seek to maximize wealth is largely inapplicable to federal judges whose salaries are fixed and tenure is secure.[63] A justice cannot get a better salary by doing a better job as a justice. She may, however, try to maximize other interests, including preserving leisure time, desire for prestige, promoting the public interest, avoiding having their decisions overturned, or enhancing reputation.

> [P]ersonal dislike of a lawyer or litigant, gratitude to the appointing authorities, desire for advancement, irritation with or even a desire to undermine a judicial colleague or subordinate, willingness to trade votes, desire to be on good terms with colleagues, not wanting to disagree with people one likes or respects, fear for personal safety, fear of ridicule, reluctance to offend one's spouse or close friends, and racial or class solidarity[64]

may also represent interests Justices maximize. Additionally, justices might seek to maximize their sense of duty, for example, trying to make the best decision in light of the relevant legal materials. These different interests suggest the possibility that the search for a single, universal maximand is futile.

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61. *See* p. 177 ("If a choice were to be made among President, Congress, and Court as to which branch should rule, we continue to put our money on the justices.").

62. I attribute this test of the attitudinal model to Mark Graber, who suggested it to me.

63. *See* U.S. CONST. art. III. § 1.

64. RICHARD A. POSNER, OVERCOMING LAW 130-31 (1995).

Lastly, attitudinalists have conceded the relevance of "context," or the facts of a given case, to a judicial decision.[65] This concession effectively admits the relevance of precedent as a constraint on justices, because the particular facts of a case are important for providing the grounds on which justices distinguish or analogize between cases.

B. *The Problem of Constitutional Change*

Constitutional change, in the short and long terms, poses serious difficulties for the attitudinal model. First, the attitudinal model is based in part on the presumption that individual justices have fixed ideological preferences at the start of their respective tenures. Fixed preferences ought to be relatively easy to measure. If they shift, however, there would be no tangible measure of a justice's ideology against which to assess her subsequent decisions. Unfortunately, there are no data confirming that justices have fixed preferences at the outset of their respective appointments. The search for these fixed preferences often leads the authors around in circles.

This problem is evident in the authors' treatment of John Marshall. They accept the misconception of Marshall as dominating his Court intellectually to further the Federalist Party's policy preferences.[66] They fail to acknowledge, much less appreciate, the fact that nearly all of Marshall's constitutional opinions were delivered for a Court with a hand-picked Jeffersonian majority on it. Most of the justices with whom Marshall served were chosen because of their antipathy towards Federalist policies and sympathy towards the Jeffersonian constitutional vision.[67] Thus, the Court, with Marshall as Chief Justice, repudiated Federalist preferences that the Constitution be construed rigorously with any ambiguities in its language resolved according to the "rule of choosing the meaning that best comported with the objects, or purposes, of the Constitution as stated in the Preamble";[68] that our

65. *See* p. 319 ("Facts obviously affect the decisions of the Supreme Court . . . .").

66. *See* p. 117 ("Unquestionably, John Marshall dominated his Court as no other justice has."). For the contrary viewpoint, see R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 413 (2001) (arguing that the unanimity achieved during Marshall's tenure as Chief Justice was not so much a function of his superior intelligence as a reflection of his willingness to compromise):

> By bending a little, Marshall preserved a lot. . . . [I]t was flexibility, along with tactical savvy that permitted Marshall to salvage so much of his constitutional nationalism in an age hostile to it. It's an unprovable counterfactual statement to say that Marshall's timely strategic retreat foiled his enemies, but it's a good guess that it did.

For more critical analysis of misconceptions about Marshall, see Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399 (2002).

67. Republican appointees filled 10 of the 11 vacancies arising on the Court during Marshall's tenure.

68. William Winslow Crosskey, *Mr. Chief Justice Marshall*, *in* MR. JUSTICE 3 (Allison Dunham & Philip B. Kurland eds., 1964).

Constitution is not one of enumerated powers but rather invests the Congress with "a general lawmaking authority for all the objects of the government that the Preamble of the Constitution states";[69] that the "United States formed a single nation as to 'all commercial regulations' ";[70] and that the common law was part of the law of the United States and thus allowed for Supreme Court supremacy over the state courts with respect to all questions of state law and common law.[71] The attitudinal model cannot explain why Marshall abdicated these strongly held Federalist views as Chief Justice.

Moreover, some justices' attitudes seem to shift. The authors suggest Justices Blackmun, Stevens, and Souter each became more "liberal" over time, while Justice White became more "conservative" over time (p. 218). Similarly, the authors accept the conventional account that in 1937 Owen Roberts and Charles Evans Hughes switched from being "conservative" to joining the "liberals to uphold" the constitutional foundations of progressive economic regulations (p. 140). The problem with these characterizations — even if they were true[72] — is that the attitudinal model cannot explain the shifts. If justices' ideological preferences change, the model has to attribute the changes to exogenous factors. Yet, the attitudinal model posits none for the specific changes mentioned by the authors or the general phenomenon of shifting judicial preferences.

Second, the attitudinal model is no more useful for explaining why the ideological categories to which it assigns justices shift over time. The authors gloss over shifts in the meanings of these categories, merely defining them on the extent to which they favor or support policies that are popularly viewed as liberal or conservative.[73] If, however, the meanings of these categories shift, the model cannot explain why. The authors' categorization of ideologies cannot account for, and is in fact undermined by, ideological drift, which is the phenomenon by which a view generally associated with one political faction is over time appropriated by or becomes associated with a different one.[74] Thus, aggressive judicial review might in one period appear to be liberal, while in another it might appear to be conservative. The fact that such alterations occur is beyond doubt, even assuming particular justices' attitudes are fixed.

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69. *Id.* at 12.

70. *Id.* at 18.

71. The Court rejected this view in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

72. For a contrary perspective, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993).

73. *See* p. 323.

74. *See* Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 637-38 (2002).

Examining the public perceptions of John Marshall, Roger Taney, and Felix Frankfurter provides some illumination. Marshall was known throughout much of his career, particularly on the bench, as overseeing a Court that became a "fortress of conservatism,"[75] because decisions he joined expanded national power at the expense of state sovereignty and upheld private-property rights at the expense of social and economic reform.[76] Chief Justice Taney, on the other hand, exemplified many liberals of his day, because of his respect for popular democracy and states' governmental and social reforms.[77] It is because of ideological drift that contemporary liberals find something in common with Marshall and not Taney.

In contrast, Frankfurter was the strongest advocate for judicial restraint during his twenty-two-year tenure on the Court. Praised by liberals for his staunch defense of judicial restraint in evaluating progressive economic regulations through his first decade on the Court, Frankfurter was upset to find that in the late 1940s and early 1950s liberals were denouncing him.

> Now, when he advocated judicial restraint, he was attacked by those very liberals [who had once praised him]. In his earlier years, pillars of the legal community like Henry Stimson, Emory Buckner, and Charles Burlingham praised him. Now, they were either dead or silent . . . . [I]n the Truman years, there was little White House contact. Frankfurter had never believed he was "the single most influential man" in Washington but sometimes he had enjoyed the notoriety. Now there was no more notoriety; he was only one of nine, and one under increasing criticism from those once his friends.[78]

In subsequent years, Frankfurter's status as a liberal has continued to fade away.

Third, the attitudinal model cannot fully explain stability in constitutional doctrine. The authors insist that justices will not vote against the interests of the governing political coalition, but the governing political coalition sometimes does not get the change(s) it wants. The authors ignore this fact in their political history of the Court, which is filled with inexplicable periods in which new justices failed to alter constitutional doctrine to the extent preferred by the political forces

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75. ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 322 (1946).

76. *See* CARL BRENT SWISHER, ROGER B. TANEY 350 (1935) ("The popularity of John Marshall . . . and the prestige acquired by the Supreme Court during his régime, resulted largely from the fact that he wrote into constitutional law the beliefs and prejudices of a class, the class, incidentally, from whose records and in terms of whose judgments most of the history of the period has been written. Outside of that class he and his court were anything but popular. . . .").

77. *See* Carl Brent Swisher, *Mr. Chief Justice Taney*, *in* MR. JUSTICE, *supra* note 68, at 35.

78. LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 456 (1984).

responsible for their appointments.[79] Indeed, there are many areas in which judicial closure is achieved, in spite of the fact that many justices might personally disagree with the position(s) reached.[80] A striking recent example is *Dickerson v. United States*,[81] the Court's seven to two decision, in an opinion by Chief Justice Rehnquist, reaffirming *Miranda v. Arizona*[82] in spite of a longstanding effort by Republicans to dismantle *Miranda.*

Fourth, the attitudinal model does not address the phenomenon of institutional path dependence. A decision has path dependency if it compels or forces judges to forego or accept other choices.[83] While attitudinalists claim precedents do not generate any path dependency in constitutional law,

> [i]nstitutions are relatively persistent, and thus both carry forward in time past political decisions and mediate the effects of new political decisions. The creation of institutions closes off options by making it more costly to reverse course, by differentially distributing resources, and by tying interests and identities to the status quo. [Moreover,] the persistence of institutions across time can foster political crises and change as they enter radically changed social environments or abrade discordant institutions.[84]

The attitudinal model does not address the link between constitutional design and social or political change. As the next Part suggests, this link is just one area in which the authors at the very least should do further research to refine their model.

IV. RETHINKING THE ATTITUDINAL MODEL

The attitudinal model is based in part on the presumption of a coherent distinction between the external and internal perspectives of the Supreme Court. There is, however, no such neat distinction. In the real world of the law, judicial decisions are not made in a vacuum. Justices operate not only with formal strictures (such as laws forbid-

79. *See* pp. 118-19, 130, 132-33, 135, 138, 153, 156, 159.

80. These decisions include incorporating most of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, upholding the constitutionality of legal tender, upholding the constitutionality of congressional regulation of private economic activity, upholding abortion rights for more than a decade, and upholding the constitutional foundations of the New Deal and the Great Society.

81. 530 U.S. 428 (2000).

82. 384 U.S. 436 (1966).

83. *See* Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 617 (2000) (reviewing SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999)) (internal citations omitted).

84. Whittington, *supra* note 83, at 616.

ding bribery), procedural requirements, and norms, but also within a conceptual framework. Together, these elements constitute the special institutional environment within which justices decide cases. In recent years, legal scholars and political scientists have studied the specific ways in which this environment shapes judicial decisions. Because these studies support other models, they pose serious problems for the attitudinal model. Attitudinalists have not yet addressed either these problems or the implications of these studies for future research on the Court.

A. *Supreme Court Selection*

In compiling data on Supreme Court selection, the authors discount the strength of the relationship between justices' backgrounds and their attitudes. Other scholars have, however, drawn interesting conclusions about this relationship from simple bivariant analyses. For instance, Richard Lazarus examined the correlation between justices' votes in cases involving environmental law and their love of the outdoors or personal involvement in activities that would familiarize them with the importance of environmental protection (such as hiking, hunting, and fishing).[85] More recently, Tracey George suggested that former academics show the greatest skepticism about or willingness to question doctrine.[86] Hence, she proposes that a president who wants to appoint a justice interested in challenging accepted doctrine should consider leading academics as possible appointees. In addition, Lee Epstein, Jack Knight, and Andrew Martin suggested that over the past two decades prior judicial experience has become a norm in Supreme Court selection.[87] On their view, this norm has evolved at the expense of greater diversity in the backgrounds and experiences of the justices, which could improve the quality of the Court's decisions.[88] These studies should spur inquiries into why some justices vote consistently with their backgrounds and others do not.

Discounting presidential selection criteria presents a bigger problem for the authors. David Yalof's study of Supreme Court selection shows presidents generally have very specific criteria in mind when choosing Supreme Court nominees.[89] This has been particularly true

85. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000).

86. Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001).

87. Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

88. This research is hardly without problems. For instance, Supreme Court selection is rarely based on a single factor, such as background, while persons with backgrounds unlike those on the Court might still share those justices' methodological commitments or attitudes.

89. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999).

for Republican presidents over the past two decades. President George W. Bush, who has not had the opportunity to nominate anyone to the Supreme Court, has chosen non-Supreme Court judicial nominees thus far pursuant to careful ideological screening.[90] While each president's selection criteria might not explain senators' conceptions of or reactions to particular nominations,[91] they represent the keenest insights on justices' likely ideology at the outset of their respective tenures. Rather than look for a proxy for a justice's ideology based on presidents' and senators' attitudes, the authors should consider testing a justice's votes against selection criteria. A correlating pattern would support their model, while the absence of such a pattern would require explanation.

B. *Postpositivists on Precedent*

There is considerable postpositivist research that the authors do not address. First, Gillman has summarized postpositivist research on precedent that supports the legal rather than the attitudinal model.[92] This research obliges the authors to explain why the techniques employed in these studies are flawed (though they are common among social scientists) or modify their conception of the legal model accordingly.

Second, Keith Whittington has proposed research on "better integration" of the different models of the Supreme Court.[93] It would entail addressing the justices' sense of mission, the phenomenon of "Law Talk"; "the extent to which judicial decision making is dependent on prior cognitive maps that shape how the justices approach a given case

90. *See, e.g.*, Kris Axtman, *The Case of Judges v. Ideology*, CHRISTIAN SCI. MONITOR (Boston), Jan. 23, 2003, at 2; Hans S. Nichols, *White House Wishes*, INSIGHT ON THE NEWS, Jan. 6, 2003, at 18.

91. Other research suggests that in times of divided government, institutional considerations (such as consulting with congressional leaders) have been more important in Supreme Court selection than they have when the President's party controls the Senate. *See, e.g.*, Christine L. Nemacheck & Rachel P. Caulfield, Giving Advice: Congressional Lobbying in Supreme Court Selection from 1930 to 1992, Presentation to the Midwest Political Science Association (Apr. 12, 2002) (unpublished manuscript, on file with author). In the latter circumstances, presidents have been relatively free to make choices based primarily on their preferred criteria.

92. The authors fail to address, inter alia, recent research on "the use of precedent by lawyers in case briefs and by justices in conference discussions, where discussion of legal materials cannot be merely a matter of public relations"; "precedential effects on other [lower] courts"; "judicial practices, such as writing concurring and dissenting opinions (forms of behavior that are not about policymaking), inviting legislative overrides, and patterns of case selection during the cert-granting process"; and "how distinctive jurisprudential categories or doctrines have influenced voting and opinion writing on the Supreme Court." Gillman, *supra* note 13, at 480-81 (internal citations omitted).

93. Whittington, *supra* note 83, at 632. For a similar approach to analyzing how the court operates, *see* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001).

and imagine available choices"; "how the law maintains itself over time"; and "the preconditions of legal change."[94] He lauds other scholars for demonstrating

> the value of moving beyond vote counting and individual decisions and examining the role that the Court plays in the American political system as a whole. In doing so, they point to the interpenetration of law and politics and the difficulty of regarding them as either separate spheres or trying to collapse one category into another. Certainly work by interpretive institutionalists . . . [has] been deeply concerned with strategic action. Recent work by rational choice scholars similarly points the way toward an integration of analysis of strategic judicial behavior and the production and influence of the law.[95]

Whittington suggests institutional analysis provides a bridge between "empirically minded political scientists interested in the law" such as Spaeth and Segal and other scholars.[96] He explains that "[t]he examination of judicial decision making is already benefiting from efforts to link the courts to other political and social actors and to situate the judiciary within a nested set of discourses and social practices."[97] Clarifying this link will elucidate "the many ways power is exercised both inside the Court and out."[98]

Third, the authors do not address Deborah Gruenfeld's work on group dynamics within the Court. In one study, she examined the "integrative complexity" of the justices in majority and minority opinions, i.e., she studied the extent to which being in the majority or dissent pressured the justices to expand their opinions to include some discussion of opposing views.[99] Her findings supported a "status-contingency model, which predicts higher levels of [integrative] complexity among members of majority factions [on the Court] than among members of either minority factions or unanimous groups independent[] of the ideological contents of their views."[100] In another study, she examined the extent to which a justice's status, in the majority or dissent, shaped her integrative complexity in decisions to uphold or overturn precedent. Gruenfeld and her coauthor found that "justices writing on behalf of decisions to uphold precedent exhibited greater integrative complexity than did justices writing on behalf of decisions to overturn precedent, but this effect was stronger for the

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94. Whittington, *supra* note 83, at 628.

95. *Id.* at 630-31 (internal citations omitted).

96. *Id.* at 631.

97. *Id.* at 631.

98. *Id.*

99. Deborah H. Gruenfeld, *Status, Ideology, and Integrative Complexity on the U.S. Supreme Court: Rethinking the Politics of Political Decision Making*, 68 J. PERSONALITY & SOC. PSYCHOL. 5 (1995).

100. *Id.* at 5.

authors of majority than minority opinions."[101] These findings support the legal rather than the attitudinal model.

Fourth, Dean Revesz has shown that two other factors ignored or discounted by rational-choice theorists influence outcomes, namely, panel compositions (i.e., who sits with whom) and case selection (i.e., litigants' choices about which cases not to settle but rather to take all the way up through the court system).[102] These findings undermine the attitudinal claim that ideology is the driving force of all judicial decisions.

C. *Retesting the Legal Model*

The new institutionalism suggests a middle position between attitudinalists' profinity for empirical analysis of legal influences and legal scholars' skepticism of empirical testing of legal reasoning. Institutionalists examine the patterns and practices of the Court over time to illuminate the constant or competing trends in its decisionmaking. These patterns and practices support a synthetic rather than unidimensional model of the Court. Below, I assess three different ways in which these patterns oblige the authors (and others) to perfect, or if necessary concede the limitations of, their model.

1. *Institutional Patterns*

The attitudinal model can be tested further by researching several patterns in the Court's decisions. First, one could determine how each justice has prioritized major sources of constitutional meaning, including text, structure, original intent, and precedent.[103] Such research would clarify whether these priorities hold true across different cases and the conditions under which they change. Second, no data has been collected on the areas in which the Court has achieved closure or stability. Third, researchers have yet to clarify the full range of constitutional questions resolved by the political branches, including foreign affairs, impeachment, appointments, vetoes, and war powers. Indeed, as this Review goes to press the Senate is divided over

101. Deborah H. Gruenfeld & Jared Preston, *Upending the Status Quo: Cognitive Complexity in U.S. Supreme Court Justices Who Overturn Legal Precedent*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1013, 1013 (2000).

102. *See* Revesz, *supra* note 50, at 175-77. Of course, one problem with this study is that it merely measures how different panels have decided different cases. No single case is ever decided by more than one court much less by multiple panels with different compositions.

103. *See, e.g.*, *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Senate Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 108th Cong. (2003) (special hearing on the constitutionality of the filibuster); Michael Stokes Paulsen, *The Many Faces of "Judicial Restraint,"* 1993 PUB. L. REV. 3 (differentiating conservative justices based on their respective prioritizing of different sources).

one such issue: the constitutionality of the filibuster, particularly as applied to judicial nominations.[104] Fourth, scholars should explore whether some models explain some votes or decisions better than others.[105] This research would clarify the utility of each model.

2. *The Limited Path Dependency of Precedent*

The authors ignore how a precedent's form shapes its potential to constrain. The justices' training and duties narrow their options for packaging their decisions; they frame their judgments as rules or standards. Rules and standards constrain judicial decisionmaking differently, and these differences explain precedents' limited constraint on the Court's decisions.

By design, rules constrain choices more than standards.[106] Rules constitute broad, inflexible principles that provide clear notice to those to whom they apply and that allow minimal discretion from those charged with implementing them. A speed limit is a prime example. It sets forth the maximum speed at which someone may travel legally. Anyone who exceeds the limit violates the law. The law allows no exceptions. The only discretion permitted by the law is measuring the speed at which someone has been driving against the maximum allowed to determine compliance.

The more absolutist the rule declared by the Supreme Court the more strongly it imposes path dependency on the law. A good example is the rule that Justice Scalia proposes in racial-discrimination cases.[107] His rule would preclude almost all racial preferences. It permits virtually no discretion for any lawmakers or justices. Such constraint is the objective.

In contrast, standards set forth criteria against which governmental action is measured.[108] Compliance entails discretion because a standard's implementation requires a decisionmaker to interpret the

104. *See, e.g.*, Paulsen, *supra* note 103 (differentiating conservative justices based on their respective prioritizing of different sources).

105. *See, e.g.*, Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003) (suggesting, inter alia, the possibility that different models explain different justices' votes).

106. *See generally* Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743, 751-53 (1998).

107. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (stating categorically "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction").

108. *See* Sullivan, *supra* note 106, at 753-58.

criteria and to determine whether they have been met. Standards abound in constitutional law.[109]

To date, no one has collected data on standards and rules. The Court's judgments can be categorized in terms of the numbers of rules it has formulated; the breakdown of its rules into subject areas and in terms of their relative clarity; the numbers of standards; and the breakdown of standards into subject matter and clarity. These data will clarify patterns in decisionmaking, including the areas in which the Court frames its most restrictive judgments and those in which it frames its least restrictive. The research will also clarify how many clearly stated judgments have failed to constrain or lead to predictable outcomes and how many resist categorization. For instance, David Strauss has explained that *Brown v. Board of Education*[110] did not announce a clear principle of equal protection but rather can be read as setting forth one of at least five different principles.[111] Similarly, in *Griswold v. Connecticut*,[112] the majority announced at least four theories supporting the outcome. Research on how many other decisions declare unclear or multiple rationales would illuminate the precedents, claimed by Dworkin, allowing "weak" or "strong" discretion.[113]

3. *The Multiple Functions of Precedent*

The authors' conception of precedent is so narrow that they ignore other functions precedent performs in constitutional adjudication. The attitudinal model cannot explain these functions, because they reflect how precedent shapes legal reasoning, argumentation, and outcomes.

Identifying and tracking these functions should be easy. First, precedents legitimize fundamental aspects of constitutional argumentation including sources of authority, interpretive methodologies, and constitutional conceptions. Precedents serve as a testing ground for each of these things, and how precedents deal with them shapes constitutional argumentation within, and beyond, the judicial process. Second, precedents impose order on the legal system. They settle

109. Just a few examples include the balancing tests the Court employs for determining the reasonableness of searches or seizures, the propriety of some congressional encroachments on the powers of other branches, and the Court's varying levels of scrutiny for equal protection disputes and free speech claims.

110. 347 U.S. 483 (1954).

111. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

112. 381 U.S. 479 (1965).

113. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31-33 (1978) (distinguishing between an order that empowers individuals with broad latitude because it does not set forth any criteria a decisionmaker has to satisfy, and orders that specify criteria, which allow decisionmakers to use their judgment within clear boundaries).

disputes, frame judicial and other agendas, and clarify what one needs to do to prevail in constitutional adjudication. Third, precedents illuminate and shape constitutional structure. They influence the relationship between the Court and other institutions. They serve as a unique outlet for airing differences of opinion about constitutional matters, take the heat off other branches by disposing of issues they would prefer not to settle themselves, and shape the dialogue among the branches about constitutional meaning. Fourth, precedents educate the public, the legal community, and the world about the Court and the Constitution. Precedent serves as a unique medium through which others can view the Court *and* through which the Court views sources, its own authority, and other branches' authority.[114] Fifth, precedents illuminate and shape constitutional history. Some precedents are so closely intertwined with historical events that one cannot understand the events or the precedents without understanding their relationship — e.g., *Dred Scott v. Sanford*,[115] the Civil War, and Reconstruction on the one hand, and *Bush v. Gore*, the 2000 presidential election, and George W. Bush's presidency on the other. Precedents also reflect the attitudes of their respective historical periods,[116] and constitute a chronicle of constitutional history for the Court and others.[117] Lastly, precedents implement constitutional values, i.e., they translate certain ideals into action.[118] A single precedent can serve one or more of these functions, all of which need to be measured for a comprehensive understanding of what the Court does.

CONCLUSION

Though legal scholars will be tempted to reject the attitudinal model as overly problematic, they should consider the following questions: Would they defer to any Supreme Court nomination made by any president? Would they approve any lower-court nominees in the hopes they would defer to Supreme Court precedent? Most law

114. *See, e.g.*, Cass R. Sunstein, *The Supreme Court 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 69-71 (1996) (describing the "expressive function" of the Court as announcing the values and shaping popular understanding of the contents of our common constitutional culture, which forms the core of the sense of political community that comprises the United States).

115. 60 U.S. (19 How.) 393 (1856).

116. *See, e.g.*, Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1051-55 (1990) (arguing that our judicial precedents and traditions have shaped our current attitudes and practices).

117. Both the adversarial system and the justices' keeping an eye on each other's opinions provide checks on the Court's mediations of past events by subjecting the Court's historiography to close scrutiny.

118. *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3 (2001) (suggesting judicial review, "like the Constitution, should be regarded as a practical mechanism which implements a subtle form of democratic rule").

professors would probably answer "no" to both questions. These answers concede the relevance of at least some legal attitudes to how judges and justices will approach precedent, including how much they ought to defer to it or how they would go about creating new precedent. Clarifying the extent of this relevance is a goal that law professors share with Spaeth and Segal. Whether this goal can be achieved depends on scholars' attitudes about the prospects for a common methodology to explain the Supreme Court as comprehensively as possible.